Supreme Court, U.S.
FILED
SEP 19 2001
OFFICE OF THE CLERK

No. 00-1829

IN THE

Supreme Court of the United States

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLANT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONER

LARRY A. WALRAVEN
BRIAN A. SELVAN
O'MELVENY & MYERS LLP
610 Newport Center Dr.
Suite 1700
Newport Beach, CA 92660
(949) 760-9600

WALTER DELLINGER
(Counsel of Record)
SRI SRINIVASAN*
ERIKA FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in California only*

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THE CIRCUITS ARE SPLIT OVER WHETHER THE FORFEITURE DOCTRINE APPLIES OUTSIDE THE "PERFECTLY CLEAR" EXCEPTION. 2

II. THE CIRCUITS ARE SPLIT OVER THE PROPER REMEDY TO APPLY UNDER THE FORFEITURE DOCTRINE. 6

III. THIS COURT SHOULD ADDRESS WHETHER THE FORFEITURE DOCTRINE IS EVER APPROPRIATE. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Armco, Inc. v. NLRB,
832 F.2d 357 (6th Cir. 1987).....7

Capital Cleaning Contractors, Inc. v. NLRB,
147 F.3d 999 (D.C. Cir. 1998).....2, 3, 5, 7

NLRB v. Burns International Security Services,
406 U.S. 272 (1972).....*passim*

Phelps Dodge Corp. v. NLRB,
313 U.S. 177 (1941).....6

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984).....6

U.S. Marine Corp. v. NLRB,
944 F.2d 1305 (7th Cir. 1991) (en banc).....7, 9

REPLY BRIEF FOR PETITIONER

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), this Court held that a successor employer is not bound to honor the terms of its predecessor's collective bargaining agreement. Instead, "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id.* at 294. The Court has not revisited the scope of a successor employer's right to establish the initial terms of employment in the nearly 30 years since *Burns* was decided.

The Court ought to do so now. The petition presents three important, recurring questions regarding a successor employer's *Burns* right to set the initial terms and conditions of employment. The first two questions implicate clear conflicts among the courts of appeals on the extent to which an employer may be found to have forfeited its *Burns* right. This Court's review is also needed to settle the sharp disagreement among courts of appeals judges on the third question presented.

The Board errs in contending that there is no conflict among the circuits on the first question presented. The Ninth Circuit held that a successor employer that commits any unfair labor practice forfeits its *Burns* right and must pay back wages and benefits under its predecessor's collective bargaining agreement. The D.C. Circuit, by contrast, has held that the forfeiture doctrine is a "corollary" to the "perfectly clear" exception suggested in *Burns*, and that therefore a successor forfeits its *Burns* right only if its unfair labor practice falls within that narrow exception. The Board simply ignores the relevant portions of the D.C. Circuit's opinion, thereby avoiding the brunt of the circuit split altogether.

The Board understandably does not dispute the existence of a conflict on the second question. Indeed, the D.C. Circuit has explicitly recognized this split in authority. The Board's only argument against review is its assertion that this case is

in an "interlocutory posture." That contention is without merit. The remand in this case requires nothing more than an *application* of the Ninth Circuit's legal rule. As a result, the remand will not affect either the substance of the Ninth Circuit's rule or the conflict between that rule and the approach adopted by other courts of appeals. Thus, the issue of the appropriate remedy under the forfeiture doctrine is squarely presented by this case in its present posture, and there is no reason for this Court to defer review.

The Board barely addresses the third question presented and fails to come to terms with persuasive dissenting opinions that call into question the very basis of the forfeiture doctrine. Beyond establishing that the forfeiture doctrine has no foundation in *Burns*, those dissents warn of the severe economic implications of a doctrine that discourages employers from attempting to revitalize failing businesses. Those economic concerns carry all the more weight in an era of corporate downsizing, restructuring, and bankruptcy.

I. THE CIRCUITS ARE SPLIT OVER WHETHER THE FORFEITURE DOCTRINE APPLIES OUTSIDE THE "PERFECTLY CLEAR" EXCEPTION.

Contrary to the Board's contention, the question whether the forfeiture doctrine applies outside the "perfectly clear" exception is hardly one of "first impression." Opp. 9. The D.C. Circuit in *Capital Cleaning* recently examined and rejected the precise position that the Ninth Circuit adopted in this case, and the same position that the Board now advocates. This Court also rejected that position 30 years ago in *Burns*.

1. The D.C. Circuit's decision in *Capital Cleaning* cannot be reconciled with the Ninth Circuit's holding in this case. *See* Pet. 17-20. The Board submits that the D.C. Circuit did not address the applicability of the forfeiture doctrine outside the "perfectly clear" exception. Opp. 13. That contention is incorrect. The Board simply ignores the

D.C. Circuit's holding that the forfeiture doctrine is "corollary" to the "perfectly clear" exception. *See Capital Cleaning*, 147 F.3d at 1008; Pet. App. 18a (O'Scannlain, J., dissenting) ("[T]he majority invokes the so-called 'forfeiture doctrine,' which courts have properly characterized as a 'corollary' to the perfectly clear exception.") (quoting *Capital Cleaning*). The Board also ignores the D.C. Circuit's further holding that, under *Burns*, the forfeiture doctrine is *limited* to the perfectly clear exception and does not apply to unfair labor practices that fall outside of that exception. *See Capital Cleaning*, 147 F.3d at 1008.[1]

The Ninth Circuit, by contrast, dramatically expanded the forfeiture doctrine by applying the doctrine to an ordinary, non-"perfectly clear" unfair labor practice.[2] In so holding, the Ninth Circuit departed from courts such as the D.C. Circuit that "have previously applied the forfeiture doctrine only in cases in which a successor employer discriminatorily refused to hire its predecessor's employees because of their union membership." Pet. App. 19a (O'Scannlain, J., dissenting).

The resulting circuit conflict deserves this Court's attention for a number of reasons. Foremost among those reasons, as explained in the petition, are the uncertainty that the decision creates for potential successor employers and

---

[1] For the unfair labor practices at issue in *Burns*, which are very similar to those at issue in this case, "the proper remedy was a bargaining order." *Capital Cleaning*, 147 F.3d at 1008; *see also* Pet. 18-19.

[2] The Board argues that the Ninth Circuit did not hold that the forfeiture doctrine applies to *any* unfair labor practice, but rather only to those practices that are "sufficiently similar to discriminatory hiring practices." Opp. 14 n.6. Even if the Ninth Circuit had so limited its holding, which it did not, its expansion of the forfeiture doctrine to an unfair labor practice outside of the "perfectly clear" exception still conflicts with the D.C. Circuit's opinion in *Capital Cleaning* and this Court's decision in *Burns*.

the inevitable forum shopping that the decision will generate. *See* Pet. 19, 23-25; *see also* Amicus Brief of Council on Labor Law Equality ("COLLE Br.") 6-10.

2. The Board attempts to reconcile the decision below with *Burns*, but *Burns* itself rejected the interpretation that the Ninth Circuit has now adopted. The Board mischaracterizes *Burns* as establishing a "linkage" between an employer's right to set the initial terms and conditions and its duty to bargain with the predecessor's union. *See* Opp. 12 (arguing that ASI "sought the benefit of setting initial terms while it evaded the obligation to bargain with the Union, thereby breaking the *linkage* between benefit and obligation that is required by the Act") (emphasis added). *Burns* clearly establishes, however, that "a successor's duty to bargain and the right to set initial terms" are "separate issues." Pet. App. 22a (O'Scannlain, J., dissenting) (citing *Burns*). Indeed, *Burns* envisions *no* circumstances under which a predecessor's collective bargaining agreement may be imposed without the successor's consent. *See* 406 U.S. at 287 (both successor and union "are free from having contract provisions imposed upon them against their will"); *id.* at 291 (successor not bound by collective bargaining agreement unless successor "assumed the obligations under the old contract").[3] As Judge O'Scannlain emphasized in dissent, "[t]he court appears to confuse a successor employer's obligations under the NLRA, and its right to set the initial terms of employment. *Burns* made clear that these issues are not inter-linked." Pet. App. 23a.

---

[3] Thus, the Board's contention that this Court in *Burns* did not "address the effect of the successor's unlawful recognition of the rival union upon [the successor's] right to set initial employment terms," Opp. 11, is plainly incorrect.

3. The Board's attempt to defend the merits of the decision below is also unpersuasive.[4] According to the Board, ASI, "by issuing the 'no union' threat," "sought to 'block[] the process' by which its obligation to bargain with the Union might, as a practical matter, have been made effective." Opp. 11. This Court rejected that same argument in *Burns*. The unfair labor practice in *Burns* – illegally supporting a different union – "blocked the process" as much as the unfair labor practice in this case, yet the Court in *Burns* rejected forfeiture as the proper remedy. *See* Pet. 16-17. The Board offers no distinction between the "this union" unfair labor practice in *Burns* and the "no union" unfair labor practice in this case.[5] Thus, "*Burns* directly controls this case." Pet. App. 23a (O'Scannlain, J., dissenting). Even if the decision below did present an issue of "first impression," the Ninth Circuit's complete undermining of *Burns*, combined with the national importance of this issue, would require this Court's immediate intervention.

---

[4] The more salient point for purposes of determining whether to grant review, of course, is that the decision below conflicts with the D.C. Circuit's decision in *Capital Cleaning* (and with *Burns* itself).

[5] Just as "the *Burns* perfectly clear exception remains lurking in the background" of the Ninth Circuit's holding, Pet. App. 17a (O'Scannlain, J., dissenting), it also lurks in the Board's defense of the decision below. The Board claims "[i]t is undisputed that [ASI] was obligated ... to recognize and bargain with the Union when petitioner *initially* began operating the former Aero facility," and that, "*[r]ather than honor that obligation*, petitioner unlawfully stated to the former Aero employees that there would be 'no union.'" Opp. 9 (emphasis added). The Board implies that ASI had an obligation to bargain with the union prior to setting initial terms. But Cunningham made the "no union" statement before ASI did its hiring. Because it is undisputed that the "perfectly clear" exception did not apply in this case, ASI did not yet have an obligation to bargain with the union at the time the unfair labor practice was committed. *See Burns*, 406 U.S. at 295.

II. THE CIRCUITS ARE SPLIT OVER THE PROPER REMEDY TO APPLY UNDER THE FORFEITURE DOCTRINE.

1. This Court has long held that the Board's power to address unfair labor practices is purely remedial. The Board may restore the status quo ante that would have prevailed in the absence of the unfair labor practice, but may not impose a penalty. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). As a result, the Board's power to impose back-pay is limited to "expung[ing] only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). The conflict among the courts of appeals on the second question presented concerns the proper rule by which to estimate the "actual, and not merely speculative, consequences" of a successor employer's failure to bargain prior to imposing new terms and conditions of employment.

The Ninth Circuit's decision below adopts a presumption that the status quo ante will be "restored" by imposing "an award of back pay and benefits under the repudiated bargaining agreement" from the time that the successor should have initiated bargaining until the time that the parties actually bargain to an impasse or agreement. Pet. App. 12a (emphasis added).[6] The Seventh Circuit has adopted a similar rule, holding that "restoration of the previously existing employment terms" up to and until the employer actually reaches agreement or impasse with the union "is an appropriate remedy" that restores the status quo, albeit "imprecise[ly]." *U.S.*

---

[6] In cases adjudicating an employer's Burns rights, the parties typically will not have engaged in any bargaining. After all, the very issue in such cases is whether the employer unlawfully failed to bargain before instituting new terms of employment. As a result, the actual agreement or impasse often will not occur until after the decision finding the violation becomes final.

Marine Corp. v. NLRB, 944 F.2d 1305,1322 (7th Cir. 1991) (en banc).

The D.C. and Sixth Circuits apply a very different presumption. Under the D.C. Circuit's approach, the predecessor's collective bargaining agreement may be imposed only for an objectively "reasonable time of bargaining," with a narrow exception where the Board proves "special circumstances" establishing that the successor would in fact have agreed to better terms if it had negotiated with the union. *Capital Cleaning*, 147 F.3d at 1011.[7] A contrary presumption, such as that adopted by the Ninth Circuit, would be "unreasonable" and "punitive" because "[n]o one can know with certainty what wage [the successor] would have agreed to" if it had bargained with the union. *Id.*[8] "Other courts," including the Sixth Circuit in *Armco, Inc. v. NLRB*, 832 F.2d 357 (6th Cir. 1987), "have taken an approach similar to" that of the D.C. Circuit. *Capital Cleaning*, 147 F.3d at 1012.

2. The Board does not dispute that there is a split of authority concerning the proper scope of the remedy under the forfeiture doctrine. Indeed, the D.C. Circuit has specifically observed that its view of the scope of the forfeiture remedy conflicts "with that of several other courts of appeals," including the Second, Seventh, and Ninth Circuits. *Id.* Nor does the Board dispute the importance of settling this conflict. *See* Pet. 21. The Board nonetheless submits that this

---

[7] The court found a "reasonable time of bargaining" to be the proper remedy in all other cases because, "[a]fter a reasonable period of bargaining the parties would either have negotiated a new wage rate or reached impasse." *Id.* Under either scenario, the predecessor's collective bargaining agreement would no longer apply.

[8] The court explicitly rejected "the Board's alternative presumption that [the successor] would have agreed gratuitously to pay the higher CBA rate." *Id.*

Court should decline to review the decision because it is in an "interlocutory posture." Opp. 15. In the Board's view, this Court's review would be "premature" because the Board on remand must allow further evidence about whether ASI would have bargained to impasse and imposed terms. *Id.*

The Board's argument is without merit. The remand calls for nothing more than *application* of the Ninth Circuit's rule, and so does not affect the substance of that rule or the existence of a conflict. The Board will simply implement the Ninth Circuit's approach by entering an award of backpay encompassing the entire period from the date of the unfair labor practice until the time that ASI *actually* bargains to a new agreement or to impasse unless ASI "rebut[s] the presumption with evidence that it would have bargained to an impasse and imposed less favorable terms." Pet. App. 12a. Had this case instead arisen in the D.C. or Sixth Circuit, the Board would be limited to awarding backpay only for a "reasonable period of bargaining" (*i.e.*, from the time of the violation until the time that the parties *would have* bargained to impasse) unless the Board proved that "special circumstances" warranted a more expansive remedy. In short, the sole purpose of the remand is to resolve a factual question that will neither clarify nor alter the Ninth Circuit's holding concerning the presumption that the Board should apply in determining the extent of the remedy under the forfeiture doctrine. There is thus no reason to defer review.

III. THIS COURT SHOULD ADDRESS WHETHER THE FORFEITURE DOCTRINE IS EVER APPROPRIATE.

The Board barely touches upon the third question presented: whether the forfeiture doctrine is ever appropriate, even in circumstances implicating the perfectly clear exception. As explained in the petition, *Burns* does not support the forfeiture doctrine in any circumstances. *See* Pet. 2-3, 22-23. This Court's bare mention in *Burns* of what has come to be

known as the "perfectly clear" exception suggests nothing more than a difference in when the duty to bargain arises; it does not even imply that the successor must accept the substance of particular terms. *See id.* at 3; *see also U.S. Marine*, 944 F.2d at 1329 (Easterbrook, J., dissenting) ("perfectly clear" reference in *Burns* "is about bargaining rather than substance"). The employer "would have been free to use its own terms even if it had shouted from the rooftops that it planned to hire every [predecessor] employee who applied." *U.S. Marine*, 944 F.2d at 1329 (Easterbrook, J., dissenting). By the same token, the imposition of unconsented-to terms is never remedial because it does not reinstate the status quo prior to the unfair labor practice. *See id.* at 1329-31; Pet. App. 14a (O'Scannlain, J., dissenting) (majority has "arm[ed] the Board with an unauthorized power to punish").[9] Thus, the forfeiture doctrine, which purportedly has its genesis in *Burns*' articulation of the "perfectly clear" exception, finds no support in *Burns*.

The practical consequences of the forfeiture doctrine are far-reaching. In an era when the number of failing businesses is sharply increasing and the need for corporate restructuring is greater than ever, the forfeiture doctrine's chilling effect on prospective successor employers seeking to salvage failing businesses is likely to be particularly acute. *See* COLLE Br. 6-10. If the Ninth Circuit's decision is allowed to stand, employers such as ASI will be much more reluctant to take over failing businesses, an outcome that will ultimately harm employers and employees alike.

---

[9] Indeed, as the *Burns* Court recognized, the only circumstance in which imposing the predecessor's collective bargaining agreement is even arguably remedial is where the Board finds "as a matter of fact that the successor had assumed the obligations under the old contract." 406 U.S. at 291.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LARRY A. WALRAVEN
BRIAN A. SELVAN
O'MELVENY & MYERS LLP
610 Newport Center Dr.
Suite 1700
Newport Beach, CA 92660
(949) 760-9600

WALTER DELLINGER
(Counsel of Record)
SRI SRINIVASAN*
ERIKA FRICK*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Admitted in California only*

Attorneys for Petitioner